

Would legalizing torture result in too many cases of torture? Rare counterexamples

Author: Terence Rajivan Edward

Abstract. The economist David K. Levine claims that if a government of a country makes torture legal, the inevitable result will be torture that is out of control. I point out an inconsistency in his approach to torture. I then argue that we should be open to rare counterexamples to his claim and describe a kind of counterexample.

David K. Levine has written a book which argues against treating behavioural economics as a replacement for rational-actor models. It is probably essential reading for those interested in debates over the future of economics. It also presents us with a perspective on torture and that is what I shall focus on below.

Levine tells readers that there are circumstances in which he would be prepared to torture:

Many people if faced with a choice of torturing a suspect to determine the location of a nuclear weapon set imminently to explode in a large city would be in favour of doing so. Under those circumstances I would be prepared to do so. (2012: 11-12)

Since Levine is prepared to torture in some circumstances, one might expect him to believe that torture should not be completely illegal. But Levine recommends a total legal prohibition on torture. He says that if he were brought to trial for torturing in the circumstances described, he hopes that he would be let off because of the value of torturing in these circumstances. But why not just make torture legal, rather than hoping that the court will not punish him for law-breaking?

Levine's answer is as follows:

if it is legal, despite the limited circumstances in which it is legal, then – in practice – there will be far too much torture. By the way – the evidence is overwhelming – in every instance in which a government has bureaucratized torture it has quickly gotten out of hand. (2012: 12)

We can extract a general idea here that is of interest: in relation to some legal prohibitions, there are exceptions which we already know we would like to make but which we should still not put in the law. But I have doubts about what Levine says about torture specifically.¹

To begin with, there is a well-known argument that torture is not a good means of acquiring reliable information. If the tortured individual wants the torture to end, it is rational for them to say anything that will end it, whether true or false; and if they do not want it to end, then torture for the purpose of acquiring information is pointless. It seems that Levine can only torture for the purpose of extracting information by abandoning the rational-actor framework he sets out to defend.²

I also have a doubt about whether any legal system which allows for torture in limited circumstances ends up with many cases of torture outside of these circumstances. But given the world we live in, it may not be politically wise to share this doubt.³ I shall approach the topic by means of a fiction. Once upon a time, in the sixteenth century, a lot of torture was taking place on an Arctic island and so its young king decided to prohibit torture. But there were some wicked people on the island who still wanted to torture and they spread a rumour that if torture is illegal for one month longer, a terrible curse will befall the people of the island. The islanders were in a state of agitation. The king had to do something. So he introduced a law allowing for torture in only the following very limited circumstances: if it is

¹ The application of the idea to torture was known in legal studies beforehand (see Shue 2006: 235). I suppose the economic contribution is a rational-actor model.

² Even if rational-actor models do not enable the prediction of economic crashes – Levine argues that the timing of these cannot be scientifically predicted (2012: 41) – they probably have a role to play in preventing torture.

³ David Luban observes how terrorist actions changed attitudes to torture (2005: 1425-1426) and gives examples of torture cultures which developed when torture was legal, all involving excess torture (2005: 1446-1447).

carried out when the moon is in its crescent phase, in a season when the Sun does not shine, within the second smallest home on the island, by a person over nine feet tall, wearing a hat that has a green feather, taken from a bird which dwells in a land where it does not snow. The circumstances in which torture was allowed were so specific, and so unlikely to obtain, that torture was not out of control under this revised legal system. The islanders believed that it would never be legal for them to torture, resulting in much the same positive consequences as a system prohibiting torture. What happened though to the wicked people who started the rumour? They set sail for the tropics and were never seen again.

Although this example is a fiction, it seems that torture can be legalized without causing it to get out of control if the circumstances in which torture is allowable are extremely specific and unlikely to obtain. So I disagree with Levine's claim about a consequence of legalizing torture. I suppose that a legal system which only allows for torture by means of a "narrow torture law" is rare, if instances of this kind of system exist or once existed. But, from what he says after his claim, Levine is concerned with all societies.⁴

References

- Levine, D.K. 2012. *Is Behavioral Economics Doomed? The Ordinary versus the Extraordinary*. Cambridge: Open Book Publishers.
- Luban, D. 2005. Liberalism and the Unpleasant Question of Torture. *Virginia Law Review* 91 (6): 1425-1461.
- Shue, H. 2006. Torture in Dreamland: Disposing of the Ticking Bomb. *Case Western Reserve Journal of International Law* 37 (2): 231-239.

⁴ Levine writes that "in every instance in which a government has bureaucratized torture it has quickly gotten out of hand." (2012: 12) By "bureaucratized" I take him to simply mean legalized.